Sarawak Building Supplies Sdn Bhd v The Director of Forests & Ors

HIGH COURT (KUCHING) — SUIT NO KG 40 OF 1990
ABDUL AZIZ ABD RAHIM J
13 FEBRUARY 2009

Civil Procedure — Estoppel — Res judicata — Whether defendant raised issues which had already been litigated

Public Authority — Director of Forestry — Revocation of timber licence, premature — Claim for damages — Appeal against damages awarded — Whether formula used to assess damages flawed — Whether plaintiff failed to discharge burden of proving loss or damage — Whether entitled to nominal damages only

The first and second defendants issued the plaintiff with a timber licence from 28 December 1979 until 27 December 1989. On 20 May 1980, the plaintiff had entered into a timber extraction agreement with one Tiong Toh Siong & Sons Sdn Bhd ('TTSB'), whereby TTSB was required to fell, extract and deliver an annual minimum quantity of merchantable timber logs from the licensed area. In the meantime, the defendants prematurely revoked the plaintiff's licence on 11 March 1987. The plaintiff then commenced a writ action against the defendants for wrongful revocation of the licence claiming relief in the form of damages. After hearing the parties, the court held that the revocation of the timber licence by the defendants amounted to a tort of misfeasance in public office and ordered damages to be assessed by the deputy registrar ('DR'). Before the DR, the plaintiff had submitted that it was an exporter of timber and proceeded to prove damages on the basis of loss of profits to be quantified based on the amount it could have earned by selling the timber extracted from the licensed area less the costs of extraction. The defendants submitted that the hearing for assessment of damages was a continuation of the trial itself and that therefore all the pleadings filed, evidence adduced and rulings made at the trial remained relevant. The DR awarded damages in the sum of RM57,483,928 damages ('the award sum') to the plaintiff. The DR had arrived at the award sum based on the minimum timber volume and minimum profit lost. This was the defendants' appeal against that award sum. At the same time, the plaintiff also cross appealed against the award sum. In this appeal the defendants submitted that the plaintiff had failed to discharge the burden of proving its loss or damage and

therefore should be awarded only nominal damages. The defendants also submitted that the plaintiff did not carry out any logging in the licensed area immediately prior to the revocation of the licence because of disputes between the plaintiff and TTSB, its contractor for the felling or removing of the timber logs from the licensed area. In short, the defendants alleged that the plaintiff's position was one of operational paralysis and as such it was grossly unreasonable and too remote for the plaintiff to claim loss of profit from the felling or logging of merchantable timber and the selling or exporting thereof from the licensed area. The defendants therefore contended that the approach and formula used by the plaintiff to compute damages for loss of profit was fundamentally flawed and manifestly contrary to the principle for assessment.

Held, dismissing the defendant's appeal with costs and allowing the plaintiff's cross-appeal with costs:

(1) From a perusal of the notes of proceedings of the hearing it is clear that the defendants had failed to rebut the evidence adduced by the plaintiff to prove its case. The defendants had not challenged every piece of material evidence that needed to be challenged in that they had not challenged the evidence of any of the plaintiff's witnesses. Neither did the defendants challenge nor object to the admissibility or the accuracy of the reports on the health of the timber markets in Sarawak tendered as the plaintiff's exhibits. As such the evidence and the facts which the plaintiff sought to prove must, on the balance of probability, be accepted as true and the plaintiff had established a prima facie case on the loss of profit (see paras 18 & 47).

(2) Based on the difference between the plaintiff's logging costs and the average market price of timber for the said period the plaintiff's witnesses testified as to the maximum and minimum loss of profit that could be sustained by the plaintiff during the period when the licence was prematurely revoked. Having regard to the evidence that the maximum volume of timber of all species of timber that could be felled and extracted was in the region of 1,306,551 cubic metres, the total loss of profit, at the minimum, suffered by the plaintiff for the period the licence was wrongfully revoked is RM116,675,004. Further, the defendants never challenged the formula or the calculations used to arrive at the plaintiff's probable loss of profit and should bear the risk of not challenging the formula preferred by the plaintiff in computing the loss or damage. Therefore to avoid excessive loss of profit being awarded to the plaintiff, it would be reasonable and fair to use the minimum price as the benchmark and award the plaintiff

RM116,675,004 in damages as loss of profit for the wrongful revocation of the timber licence (see paras 31 & 36).

(3) The defendant's contention that the plaintiff was in a state of operational paralysis before the revocation of the timber licence was an issue that was already dealt with in the civil trial and as such the defendants should not be allowed to relitigate the same issue again. An issue or point which had been argued and decided upon is res judicata and should not be relitigated (see para 52).

[Bahasa Malaysia summary

Defendan pertama dan kedua telah mengeluarkan satu lesen pembalakan kepada plaintif dari 28 Disember 1979 sehingga 27 Disember 1989. Pada 20 Mei 1980, plaintif telah memasuki satu perjanjian pembalakan dengan Tiong Toh Siong & Sons Sdn Bhd ('TTSB'), di mana TTSB dikehendaki untuk menebang, mengeluarkan dan menghantar satu kuantiti minimum tahunan balak yang boleh niaga daripada kawasan berlesen tersebut. Sementara itu, defendan-defendan secara pramasa telah membatalkan lesen plaintif pada 11 Mac 1987. Plaintif kemudiannya memulakan satu tindakan writ terhadap defendan-defendan untuk pembatalan lesen secara salah memohon relief berupa ganti rugi. Selepas mendengar hujahan pihak-pihak mahkamah memutuskan bahawa pembatalan lesen pembalakan oleh defendan-defendan adalah satu tort misfeasans dalam pejabat awam dan mengarahkan kerugian ditaksir oleh timbalan pendaftar ('TP'). Di hadapan TP, plaintif telah menghujahkan bahawa ia merupakan pengeksport kayu balak dan meneruskan untuk membuktikan kerugian atas dasar kehilangan keuntungan dikira berdasarkan jumlah yang ia mungkin peroleh dengan menjual kayu balak yang dikeluarkan daripada kawasan berlesen tersebut ditolak kos pengeluarannya. Defendan-defendan menghujahkan bahawa perbicaraan untuk taksiran ganti rugi adalah lanjutan daripada perbicaraan dan oleh itu kesemua pliding yang difailkan, keterangan yang dikemukakan dan keputusan yang dibuat semasa pembicaraan kekal relevan. TP memberikan award ganti rugi sejumlah RM57,483,928 ('jumlah award') kepada plaintif. TP telah mencapai jumlah award berdasarkan jumlah minimum kayu balak dan jumlah minimum kehilangan keuntungan. Ini adalah rayuan defendan-defendan terhadap jumlah award tersebut. Pada masa yang sama, plaintif juga membuat rayuan balas terhadap jumlah award tersebut. Dalam rayuan ini defendan-defendan menghujahkan bahawa plaintif telah gagal untuk melepaskan beban pembuktian kerugian dan oleh itu patut diawardkan ganti rugi nominal sahaja. Defendan-defendan juga menghujahkan bahawa plaintif tidak menjalankan apa-apa kerja pembalakan dalam kawasan berlesen tersebut sebelum pembatalan lesen tersebut disebabkan oleh pertikaian di antara plaintif dan TTSB, kontraktornya untuk membalak atau mengeluarkan kayu balak daripada kawasan berlesen tersebut.

Secara ringkasnya, defendan-defendan mendakwa bahawa kedudukan plaintif mengalami kelumpuhan operasi dan oleh itu ia adalah tidak munasabah langsung dan terlalu terpencil untuk plaintif menuntut kehilangan keuntungan daripada pembalakan kayu balak yang boleh niaga dan penjualan atau pengeksportannya dari kawasan berlesen tersebut. Defendan-defendan oleh itu berhujah bahawa pendekatan dan formula yang digunakan oleh plaintif bagi menghitung ganti rugi kehilangan keuntungan adalah secara dasarnya cacat dan adalah nyata bertentangan dengan prinsip taksiran.

Diputuskan, menolak rayuan defendan-defendan dengan kos dan membenarkan rayuan balas plaintif dengan kos:

(1) Daripada penelitian nota-nota prosiding perbicaraan tersebut adalah jelas bahawa defendan-defendan gagal untuk mematahkan keterangan-keterangan yang dikemukakan oleh plaintif bagi membuktikan kesnya. Defendan-defendan tidak mencabar setiap keterangan material yang harus dicabar di mana mereka tidak mencabar keterangan mana-mana saksi plaintif. Defendan-defendan juga tidak mencabar ataupun membantah penerimaan atau ketepatan laporan-laporan berkenaan keadaan pasaran kayu balak di Sarawak yang dikemukakan oleh plaintif sebagai ekshibit. Oleh itu keterangan dan fakta-fakta yang plaintif cuba untuk membuktikan mesti, atas imbangan kebarangkalian, diterima sebagai benar dan plaintif telah membuktikan satu kes prima facie terhadap kehilangan keuntungan (lihat perenggan 18 & 47).

(2) Berdasarkan perbezaan antara kos pembalakan plaintif dan purata harga pasaran kayu balak untuk tempoh masa tersebut saksi-saksi plaintif memberikan keterangan mengenai kehilangan keuntungan maksimum dan minimum yang boleh dikekalkan oleh plaintif dalam tempoh masa apabila lesen tersebut dibatalkan secara pramasa. Mengambilkira keterangan bahawa jumlah maksimum kayu balak dari semua spesies yang boleh dibalak dan dikeluarkan adalah dalam lingkungan 1,306,551 meter padu, jumlah kehilangan keuntungan minimumnya, yang dialami oleh plaintif untuk tempoh lesen yang dibatalkan secara salah adalah RM116,675,004. Tambahan pula, defendan-defendan tidak pernah mencabar formula atau pengiraan yang digunakan untuk mendapatkan jumlah kehilangan keuntungan plaintif yang mungkin dan harus mengambil risiko kerana tidak mencabar formula yang digunakan oleh plaintif dalam mengira kehilangan atau kerugian. Oleh itu untuk mengelak kehilangan keuntungan yang berlebihan diawardkan kepada plaintif, ia adalah munasabah dan wajar untuk menggunakan harga minimum sebagai tanda aras dan mengawardkan

plaintif ganti rugi RM116,675,004 sebagai kehilangan keuntungan untuk pembatalan secara salah lesen pembalakan tersebut (lihat perenggan 31 & 36).

(3) Hujahan defendan bahawa plaintif mengalami kelumpuhan operasi sebelum pembatalan lesen kayu adalah satu isu yang telah pun diselesaikan dalam perbicaraan sivil dan oleh itu defendan-defendan tidak patut dibenarkan untuk membangkitkan semula isu yang sama sekali lagi. Sesuatu isu atau perkara yang telah dipertikaikan dan diputuskan adalah res judicata dan tidak sepatutnya dibicarakan semula (lihat perenggan 52).]

Notes

For a case on revocation of timber licence, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) para 1724.

For cases on res judicata, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2630–2642.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359 (refd)

Bonham-Carter v Hyde Park Hotel Ltd (1984) 64 TLR 177 (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352, HC (refd)

Dodd Properties (Kent) Ltd & Anor v Canterbury City Council & Ors [1980] 1 All ER 928 (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)

John v Dharmaratnam [1962] MLJ 187, HC (refd)

Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd [1996] 4 All ER 769, HL (refd)

Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd [2007] 2 MLJ 229; [2007] 1 CLJ 611, CA (refd)

Subramaniam Paramasivam & Ors v Malaysian Airline System Bhd [1996] 3 MLJ 64; [2002] 1 CLJ 230, HC (refd)

Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd [1994] 2 MLJ 273, HC (refd)

Victor Taichung Machinery Works Co Ltd v Bright Rims Manufacturing Sdn Bhd & Anor [1998] MLJU 454; [2002] 1 CLJ 550, HC (refd)

YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd [1997] 2 MLJ 621; [1997] 4 CLJ 300, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 56 r 1(1)

Mekanda Singh Sandhu (Sandhu & Co), James Lo (George Lo & Partners Advocates) for the plaintiff.
Thomas Akin Jelimin (Yap Khan Kee with him) (Senior State Legal Officer, Attorney General's Chambers) for the defendants.

Abdul Aziz Abd Rahim J:

[1] This is the defendants' appeal (notice of appeal to the judge in chambers dated 22 May 2008 in encl 491) pursuant to O 56 r 1(1) of the Rules of the High Court ('the RHC 1980') against the decision of the learned deputy registrar on 16 May 2008 that allowed a sum of RM57,483,928 as damages to the plaintiff with no order to costs.

[2] The plaintiff also cross-appealed (notice of appeal to judge in chambers dated 22 May 2008 in encl 493) against the same learned deputy registrar's decision claiming that the plaintiff should have been awarded a sum of RM279,993,879 as damages because the defendants did not lead any evidence to rebut the plaintiff's quantification of the said sum.

BACKGROUND FACTS

[3] The plaintiff was issued with a timber licence No T/3019 by the first and second defendants. The licence was for a period from 28 December 1979 until it expired on 27 December 1989. The licensed was prematurely revoked by the defendants on 11 March 1987. The plaintiff then took the writ action against the defendants for wrongful revocation of the licence before its due expiry date and claimed for damages from the defendants. The matter came before Justice Puan Lau Bee Lan, who on 1 July 2005 entered judgment in favour of the plaintiff on liability on the finding that the defendants' act in revoking the timber licence No T/3019 amounted to a tort of misfeasance in public office and ordered damages to be assessed by the learned deputy registrar.

[4] The assessment of damages was held before the learned deputy registrar on 6, 7 and 11 December 2007 and on 28 January 2008. The plaintiff called three witnesses to testified. But the defendants did not call any witnesses.

[5] On 16 May 2008 the learned deputy registrar delivered his decision awarding the plaintiff a sum of RM57,483,928 ('the award sum') as damages.

[6] The defendants then filed this appeal and the plaintiff also cross-appealed.

[7] In his ruling on damages (at tab 3 of the appeal record encl 512) the learned deputy registrar stated in his opinion the formula for calculation of damages in this case should be based on minimum timber volume and minimum profit lost. Based on this formula he gave the plaintiff the award sum. There are no other reasons stated in his written ruling as to why he awarded the said award sum.

[8] Before the revocation of the timber licence, the plaintiff had entered into timber extraction agreement dated 20 May 1980 with one Tiong Toh Siong & Sons Sdn Bhd ('TTSB'), giving the latter the right to fell and extract all merchantable timber logs from the licensed area which is identified as Takan-Pelagus Management Plan which comprised of approximately 64,757 acres in total area. Under cl 16 of the timber extraction agreement, TTSB was required to fell, extract and deliver an annual minimum quantity of merchantable timber logs from the licenced area of not less that 20,000 hoppus tons for the 12 month period between 1 June 1981 and 31 May 1982 and thereafter of not less than 40,000 hoppos tons for every 12 month period.

[9] Various disputes arose between TTSB and the plaintiff in relation to the timber extraction agreement. These disputes resulted in the plaintiff filing in Sibu High Court a Civil Suit No 54 of 1984 against TTSB. The disputes between them were not settled until a consent judgment was entered in the said suit on 12 July 1996.

[10] On settlement of the disputes, Huang Ee Hoe received RM9,000,000 from TTSB which the former claimed to be secret profits but the defendants contended that it was related to the logging operations in the licenced area.

[11] In the meantime, the first defendant revoked the timber licence issued to the plaintiff on 11 March 1987. That is about two years and nine months before the licence was to legally and officially expired.

HEARING BEFORE THE LEARNED DEPUTY REGISTRAR

[12] Before the learned deputy registrar, the defendants submitted that the hearing on the assessment of damages was a continuation of the trial and that all the pleadings filed, evidence adduced and the rulings made at the trial remained relevant for the assessment of the quantum of damages.

[13] On the basis of the above submissions, the defendants contended that the plaintiff should be awarded only nominal damages. This contention is grounded on two factors. Firstly, the defendants said the plaintiff's position prior to the revocation of the timber licence was one of 'operational paralysis'

as it was not logging and had sought from the Forest Department a temporary 'stop order' over all logging operations in the licenced area. Secondly, the plaintiff's approach on computation of damages for loss of profits is fundamentally flawed for several reasons. On the formula on computation of damages suggested by the plaintiff, the defendants contended that the plaintiff should be precluded from relying on logging costs of RM150 per hoppus ton because it wanted to stop TTSB from logging; to rescind the timber extraction agreement; and had not given any evidence on whether the logging costs were reviewed. The defendants also said the plaintiff had not adduced evidence to substantiate PW3's evidence that it could not extract the standing stocks of timber or maintain the rate of extraction of the timber prior to the revocation of the licence. Further, the defendants said that the plaintiff had not substantiated PW3's evidence that it was a timber exporter by producing a certificate of registration issued by Sarawak Timber Industry Development Corporation ('STIDC').

[14] Before the learned deputy registrar, the plaintiff proceeded to prove damages on the basis of loss of profits to be quantified based on the amount it could have earned by selling the timber extracted from the licensed area less the cost of extraction, that is to say:

A x B – C = D, where:

A	B	C	D
Volume of timber	Price of timber	Logging cost	Profit lost

The plaintiff submitted that the above method of computation of loss of profits is consistent with the general principle of assessment of damages, namely that 'they are compensatory and should as far as possible put the injured party in the same position as if the wrong had not been committed'. *Dodd Properties (Kent) Ltd & Anor v Canterbury City Council & Ors* [1980] 1 All ER 928.

[15] The defendants did not call any evidence to rebut the plaintiff's approach to quantification of damages or the evidence upon which the assessment was based. Instead the defendants relied on evidence adduced at the earlier trial on liability and contended that the plaintiff should be precluded from relying on the logging costs of RM150 per hoppus ton because it wanted TTSB to stop logging and also to rescind the timber extraction agreement with TTSB and that the plaintiff had not given evidence of whether the logging costs were reviewed upwards. The defendants also contended that the plaintiff had not substantiated PW3's evidence that it could extract the timber or could maintain the rate of extraction of the timber prior to the revocation of the licence. Finally, the defendants

contended that the plaintiff had not shown it was a timber exporter by the production of a certificate of registration as timber exporter from STIDC.

COURT'S OPINION

[16] The law as I understand, it is that once the plaintiff had adduced prima facie evidence to prove its case, the onus is on the defendants to rebut those evidence either by cross-examining the plaintiff's witnesses and challenged every piece of material evidence that needs to be challenging and to adduce evidence of its own through its own witness. Failure to do both or either would put the defendants' case in jeopardy in that, in civil cases, the plaintiff's case may be accepted as the true version on the balance of probability. In *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621; [1997] 4 CLJ 300, the learned Mahadev Shankar JCA, having referred to the judgment of Mukharji J in an Indian case of *AEG Carapiet v AY Derderian* AIR 1961 Cal 359, said at p 659 (MLJ); p 337 (CLJ) that 'Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all'. The learned judge went further to state that 'this requirement is not merely a technical rule of evidence but is a rule of essential justice'.

[17] The fact that the defendants had failed to comply with this essential rule is obvious from the perusal of the notes of proceedings of the hearing before the learned deputy registrar (at tabs 4–1 to 4–4 of the appeal record). It can be seen that PW1, PW2 and PW3 were not cross-examined on the essential facts relied upon by the plaintiff for the assessment of loss of profits, namely the standing stocks of timber in the licenced area that could be extracted, the actual rate of logging for the 12 month period prior to the revocation of the licence, the average export prices of the timber, and the selling price of the timber as obtained by STIDC.

[18] PW1 was a Training Manager with Sarawak Forestry Corporation Sdn Bhd. Prior to that he had been with the Forest Department since 1973. He testified that he was familiar with the licensed area which is in Kapit. He further testified that the area was a good area meaning that it was highly stock with commercial timber. He also gave evidence that from his personal experience, commercial buyers of timber prefer the Dipterocarp specie to other specie of timber because of its durability and hardness. This evidence was not challenged by the defendants.

[19] According to PW1, the plaintiff's exh P2 contains the timber licence

and the first schedule of the licence describes the licenced area, the terrain features, forest status, conditions of the forest, forest management system and other details.

[20] PW1 testified that industrial utilisable timber is generally known as industrial stemwood; and these are trees with a minimum of 18 inches diameter measured at breast height to a minimum of 12 diameter measured at the top (ie the crown). These are the trees that are harvested from the licenced area for their commercial value.

[21] As to the measurement of volume of timber harvested, PW1 testified that in forest practice, two conversion rates are used. The first conversion is from true tons in log form to cubic metre, where the conversion rate adopted is 1 true ton is equivalent to 1416 cubic metres. The second conversion rate is from hoppus ton to converted timber, planks etc where the rates used is that 1 hoppus ton is equivalent to 18027 cubic metres.

[22] Again, all these evidence by PW1 are not challenged by the defendants. Therefore they must be taken to be correct.

[23] PW2 is the manager of the Legal and Secretarial Department of STIDC. She testified as to the health of the timber markets in Sarawak. She relied mainly on the extract of STIDC quarterly magazine 'PERKASA' for the market reports for the period September 1987, December 1987, March 1988, September 1988, March 1989 and June 1989. All these reports were tendered as plaintiff's exhs B, C, D, E, F and G respectively. The defendants never challenged the truth or the accuracy of these reports and never objected to their admission into evidence.

[24] PW2 also testified that STIDC was granted a timber licence No T/3189 which covered the same area as the plaintiff's former timber licence. This makes STIDC the new licensee for the same area after the plaintiff's licence was revoked by the defendants.

[25] PW2 further testified that STIDC sold the timber from this new licence at RM301 per hoppus ton plus an administrative fee of RM10 per hoppus ton thus making the total selling price at RM311 per hoppus ton.

[26] PW3 testified to the volume of timber that can be extracted from the licenced area. Based on the information contained at p 65 of exhs P2, PW3 testified that the total net industrial stemwood volume of all species is 1,892,210 true tons. This works out to 2,679,369 cubic metres on the conversion rate of 1 true ton equivalent to 1.416 cubic metres as mentioned earlier. PW3 further testified that from this figure, 501,784 cubic metres

being the amount already extracted up to the time of wrongful revocation of the licence is to be deducted. The figure of 501,784 cubic metres is evident by exh P25 which is a letter from the Section Forest Officer Sibu which recorded the volume in cubic metres of all timber extracted by the plaintiff from the concession area. After the deduction the balance of standing trees 'which are utilisable in the industry' is 2,177,585 cubic metres.

[27] However, regard must also be given to the evidence by the former Director of Forests, Datuk Leo Chai who had testified in Suit No KG 123 of 1990 that what can be felled or extracted from a licenced area would be only about 60% to 70% of the net industrial stem wood volume or the standing timber. Taking this evidence into consideration the maximum volume of all species that the plaintiff could fell and extract from the licensed area would be between 1,306,551–1,524,309 cubic metres.

[28] Now PW1 had given evidence that the plaintiff's licensed area was rich in Dipterocarp comprising mostly of Meranti, Kapur, Kruing and Selangan Batu as evident at p 65 of exh P2. According to exh P2 the total net industrial stem wood volume of Dipterocarp species only in the area was 1,422,260 true tons. Using the same method and formula as above for computation of the volume of Dipterocarp that could be felled and extracted, the plaintiff arrived at a figure of between 907,281 to 1,058,495 cubic metres of Dipterocarp.

[29] For a minimum extraction, the plaintiff relied on the last 12 months extraction record as evident in exh P25 and the volume extracted is 234,080 cubit metres or on an average of 19,506.60 cubic metres per month. The plaintiff then multiplied the monthly average with 33 months being the unexpired period of licence calculating from the date of revocation on 11 March 1987 to the date of actual expiry which was on 27 December 1989. Based on this formula, the minimum volume that could be extracted is 643,717 cubic metres.

[30] The plaintiff claimed that it was an exporter of timber. It was submitted for the plaintiff that based on PW2's evidence in exhs B–G on the price of timber for the period 1987–1989, it shows that the timber industry was experiencing active market and favourable prices with prices for Meranti ranging from USD100 per cubic metre in September 1987 through USD148 in December 1987 to USD169 in March 1989. These prices work out to an average of USD139 per cubic metre over the said period. Applying the exchange rate at the material time which was RM2.50 to USD1, the average export price for timber then was RM347.50 per cubic metre.

[31] Under cl 23 of the timber extraction agreement (exhibited in the plaintiff's supplementary bundle of documents dated 17 September 2007) is

RM150 per hoppus ton. This figure works out to RM83.20 per cubic metre on the conversion rate of 1 hoppus ton equivalent to 1.8027 cubic metre as testified by PW1. Therefore, the difference between the plaintiff's logging cost and the average market price of timber for the said period was RM264.30. Further, deduction from this figure is the sum of applicable royalty to be paid under the First Schedule of the Forest Ordinance at the highest rate for Hill Meranti which was RM50 per cubic metre. After the deduction the amount left is RM214.30 per cubic metre. This is the maximum loss of profit sustained by the plaintiff.

[32] On the other extreme, the minimum loss of profit suffered by the plaintiff is RM89.30. This figure is obtained by using the STIDC's selling price of RM311 per hoppus ton as testified by PW2. At this price it works out to RM172.50 per cubic metre using the same conversion rate as earlier. After deducting the cost of logging at RM83.20 per cubic metre, the minimum prices work out to RM89.30 per cubic metre.

[33] Having regard to the evidence that the maximum volume of timber or stemwood of all species that could be felled and extracted is in the region of 1,306,551 cubic metres, the total loss of profit, at the minimum, suffered by the plaintiff for the period the licence was wrongfully revoked is RM116,675,004 (ie 1,306,556 x RM89.30).

[34] Again, it must be reiterated that the defendants never challenged the formula or the calculations used by the plaintiff in arriving at the various possible scenarios of loss of profit, the formula or the calculations must be taken as reasonable and probable method to be used to arrive at the plaintiff's probable loss of profit.

[35] In my opinion it is reasonable to assume that in felling and extracting the timber from the licenced area, the plaintiff most probably would maximise the harvest regardless of the species and would not just confine it to the Dipterocarp specie. As for the price to be applied, I am of the view that the maximum price of RM214.30 should not be used because that is the price for Hill Meranti of the Dipterocarp specie only. If the harvest includes other species as well then the price would have varied according to species. Therefore to avoid excessive loss of profit being awarded to the plaintiff, it would be reasonable and fair to use the minimum price of RM89.30 as the benchmark. It is with these considerations that I am awarding the plaintiff RM116,675,004 in damages as loss of profit arising from the wrongful revocation of the timber licence.

[36] For the defendants it was submitted that the hearing for assessment of damages before the learned deputy registrar is a continuation of the trial itself:

Victor Taichung Machinery Works Co Ltd v Bright Rims Manufacturing Sdn Bhd & Anor [1998] MLJU 454; [2002] 1 CLJ 550 at p 551. And therefore, it was submitted that all the pleadings filed, the evidence adduced and rulings made at the trial remains relevant.

[37] It is settled law that the general rule as to the measure of damages is to put the plaintiff fairly and reasonably in the position in which he was before the damage occurred, in so far as money can do so: *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 at p 416. However, the amount awarded must not allow the plaintiff to profit from it: *Subramaniam Paramasivam & Ors v Malaysian Airline System Bhd* [1996] 3 MLJ 64 at pp 78–79; [2002] 1 CLJ 230 at pp 244–245 and *Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd* [1949] 3 MLJ 777 at p 778.

[38] The burden is on the plaintiff to show that he has suffered loss or damage and that such loss or damage is caused directly by the defendant: *Bonham-Carter v Hyde Park Hotel Ltd* (1984) 64 TLR 177 at p 178 and also *John v Dharmaratnam* [1962] MLJ 187.

[39] If the plaintiff is unable to show proof of loss or damage suffered then the plaintiff may be awarded with nominal damage: *Sony Electronics (M) Sdn Bhd v Direct Interest Sdn Bhd* [2007] 2 MLJ 229 at p 246; [2007] 1 CLJ 611 at p 628. This burden to show proof lies on the plaintiff throughout; and only when the plaintiff has discharged this burden then evidential burden shifts to the defendant. If the plaintiff fails in discharging this burden, no adverse inference may be drawn against the defendant for failure to give evidence: *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86.

[40] Applying the above principles, the defendants submitted that the plaintiff has failed to discharge the burden of proving its loss or damage and therefore should be awarded only nominal damages.

[41] The defendants submitted that the plaintiff did not carry out logging in the licenced area immediately prior to the revocation of the licence. It is also an undisputed fact that the plaintiff and TTSB, its contractor for the felling and extraction of log timber as per the agreement for extraction of timber logs entered between them dated 20 May 1980 had serious disputes of various natures. Arising from these disputes, the plaintiff filed a suit viz Sibu High Court Civil Suit No 54 of 1984 against the TTSB seeking relief, inter alia, to declare the logging agreement as rescinded and terminated and for an injunction to restrain TTSB from entering, felling or removing any timber logs from the licenced area.

[42] It was further submitted by the defendants that PW3 had also filed a

petition for winding up of the plaintiff's company in Sibu High Court vide Winding Up Petition No 1 of 1991 and wrote several letters as evident by exhs D9, D11, D12, D13, D14 and D15 to the Director of Forest requesting for the logging operation to be stopped. It is also not disputed that the disputes between the plaintiff and TTSB were only settled on 12 July 1996, that is the date well after the revocation of the licence, when a consent order was made in Suit No 54 of 1984 and the Winding Up Petition No 1 of 1991. On settlement of the disputes, PW3 received RM9m from TTSB or TTSB's shareholders and the amount which PW3 said were secret profit taken by TTSB but which the defendants argued is obviously related to the logging operation under the licence.

[43] It was argued for the defendants that given the above facts, the plaintiff did not carry out any logging in the area and had not shown any evidence that it was able to extract or produce the logs by itself and thereby profit from it. It was submitted that the plaintiff's position was one of operational paralysis. It further submitted that as the disputes between the plaintiff and TTSB were settled only in 1996 well after the expiry of the licence, the plaintiff would not be able to extract or produce any timber from the licenced area and to profit from it even if the licence had not been revoked. The defendants contended that the plaintiff's time and resources were or would have been consumed by the disputes and on-going litigation with TTSB. Therefore, it is grossly unreasonable and too remote for the plaintiff to claim loss of profit from the felling or logging of merchantable timber and the selling or exporting thereof from the licenced area. For the same reasons, it was argued for the defendants that the approach and formula used by the plaintiff to compute loss of profit and hence damage is fundamentally flawed and manifestly contrary to the principle for assessment. It was submitted that for the approach and formula to be applicable the plaintiff must prove how much timber could be extracted between the date of revocation (ie 11 March 1987) and the date of expiry of the licence (ie 29 December 1989). It was argued that the rate of logging, done after the licenced was revoked, by STIDC's contractor could not be used as a yardstick to measure how much timber could be produced from the licenced area by the plaintiff, as there was no dispute between STIDC and its contractor.

[44] As to the costs of logging at RM150 per hoppus ton as claimed by the plaintiff, the defendants submitted that this is flawed because the costs claimed by the plaintiff was based on the timber extraction agreement which the plaintiff had with TTSB and which the plaintiff wanted to rescind or terminate. Furthermore, the defendants contended that the logging costs was subject to annual reviews; but the plaintiff had not adduced any evidence of any review of the costs. Therefore it was submitted that this claim as to the logging costs should be rejected.

[45] The defendants also disputed the claim by the plaintiff that it was a timber exporter. It was contended for the defendants that a timber exporter requires a licence from STIDC under the STIDC (Registration) Regulations 1983 (Swk LN 3/1983). But in this case the plaintiff had not produced the certificate of registration as a timber exporter to substantiate its claim. It was argued for the defendants that PW2, who was the legal manager with STIDC could have confirmed for the plaintiff if the plaintiff was registered with STIDC as a timber exporter; however the defendants said the plaintiff never sought such evidence from its own witness. Therefore, the defendant contended that the export price relied on by the plaintiff in this case is irrelevant.

[46] In my view, the above arguments and contentions by the defendants are flawed. Firstly, the plaintiff's assertion of facts through the evidence of its witnesses are not challenged by the defendants through cross-examination of the plaintiff's witnesses who had testified to that facts or through its own witness called to rebut the plaintiff's evidence. As such the evidence and the facts which the evidence sought to prove must, on the balance of probability, be accepted as true: *YK Fung Securities Sdn Bhd*. Secondly, the defendants had not shown any evidence that the court has granted an injunction against TTSB from carrying out logging operation in the licenced area. The defendants also had not adduced any evidence to show that the Director of Forest had responded favourably to the plaintiff's request to stop all logging operations in the licenced area temporarily and that a 'stop order' had in fact been issued. On this last point my guess is that the Director of Forest had not responded to the plaintiff's request for a 'stop order'; otherwise the plaintiff would not be writing several letters reminding the Director of Forest on the same issue as evident in exhs D9–D15. These two facts ie the injunction and the stop order are facts asserted by the defendants; therefore the defendants must adduce evidence to support it.

[47] Likewise, the defendants also had to rebut the plaintiff's evidence as to the costs of logging and the claim that the plaintiff was an exporter of timber. It is not enough in my view for the defendants to contend that the plaintiff had not shown any evidence of annual review of the logging costs. The evidence of logging costs was based on the costs agreed by the plaintiff under the timber extraction agreement with TTSB. The defendants contended that there ought to be an upward revision of the costs over the contract period. This contention in my view implies that the defendants had evidence of upward revision of the costs. Therefore, the defendants ought to have produced this evidence to rebut the plaintiff's claim that the logging costs was RM150 per hoppus ton.

[48] As to the fact that the plaintiff was an exporter of timber, learned

counsel for the defendants submitted that PW2 could have testified to this fact but the plaintiff chose not to draw any evidence on this from PW2. I think this is a wrong approach by the defendants. It is to be noted that the defendants were offered to cross-examine PW2 during the hearing of the assessment for damages. However, the defendants did not take the opportunity to question PW2 on the issue. In my opinion the onus is not on the plaintiff to show that it is not registered as an exporter. The onus to prove so is on the defendants. All the plaintiff had to do is that to state the fact that it was an exporter of timber and adduced some evidence to that effect, which on the evidence in this case I think the plaintiff has done so.

[49] With regard to the defendants' argument that the plaintiff's approach and formula as to the assessment of damages, I accept learned counsel for plaintiff's submissions that the defendants' argument is incorrect. The damages ordered to be assessed are in respect of the commission of an intentional tort ie a tort of public misfeasance in public office. In her judgment the learned trial judge acknowledged that the defendants knew that the plaintiff had a commercial interest in the protection of the timber licence and that the revocation would injure such interest: *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769. The House of Lords in England was prepared to impose a wider liability on an international wrongdoer. As such the plaintiff's counsel in this case rightly submitted that in the case such as the present, the innocent victim (the plaintiff herein) should be allowed to recover his entire loss or all loss and damage flowing from the wrongdoing.

[50] Also the plaintiff in this instant has adduced sufficient evidence referred to earlier to establish a prima facie case on the loss of profit. But the defendants have failed to challenge the evidence through cross-examination of the plaintiff's witnesses or through its own witness. In fact the defendants had not called any witness at all.

[51] Furthermore, and with respect to the defendants' contention that the plaintiff were, just before the revocation of the timber licence, in the state of 'operational paralysis', I agree with the plaintiff that the learned trial judge had dealt with the matter and therefore the defendants should not be allowed to relitigate the issue because it has been effectually decided and thus res judicata. An issue or point which had been argued and decided upon is res judicata and should not be relitigated: *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 at pp 65-66. In this regard it is pertinent to note that the defendants had raised the issue that the plaintiff had ceased business and suffered loss and damage owing to disputes between the plaintiff and its logging contractor TTSB in its re-amended statement of defence paras 5.3 and 5.4 and the issues were fully argued before the learned trial

judge. In her judgment, and with reference to the defendants' submissions on this point before her, which is that 'even if the licence was not revoked in March 1987, it was unlikely that there would have been logging in the licenced area by SBS (ie without the involvement of TTSB) before the licence was due to expire on 28 December 1989' the learned trial judge said that 'I am inclined to agree that this argument is hypothetical and not supported by evidence'. In other words, the trial judge had already rejected the same argument that is raised before me in this instant and indicates the possibility and probability of logging being carried out in the licenced area by the plaintiff or its contractors had the licence not been revoked. In this respect, I am of the view that the disputes between PW3 or the plaintiff and TTSB should not be relevant in determining what would be the plaintiff's loss or damage flowing from the revocation of licence. In determining the loss or damage, it must be premised on the assumption that the plaintiff would have been able to exploit the full benefit of the licence before its expiry, had there been no revocation. The consideration of the presence of the disputes would only be relevant to my mind after the loss or damage had been determined and what discount should be given to reduce the loss or damage that may be attributed to the disputes. Taking this approach I think the defendants must bear the risk for not challenging the formula preferred by the plaintiff in computing the loss or damage in this instant case.

[52] For the above reasons, I shall dismiss the defendants' appeal and at the same time I will also allow the plaintiff's appeal to the extent that the damage to be awarded to the plaintiff is fixed at RM116,675,004 and accordingly I set aside the order of the learned deputy registrar on damages to be awarded to the plaintiff given on 16 May 2008.

[53] Finally, I need to say this. The award of quantum of damages by the learned deputy registrar was an exercise of discretion. Normally, the appellate court rarely interferes with the exercise of that discretion. However, in this case, I am of the view that the learned deputy registrar's decision cannot be sustained. He had not explained or gave any reason for the amount of damages that he had awarded. In the absence of any reason or explanation, I think the decision is not a proper exercise of judicial discretion.

CONCLUSION

[54] The appeal by the defendants (encl 491) is dismissed with costs. Appeal by the appellant/plaintiff (encl 493) is allowed. The learned deputy registrar's decision is set aside. The award is set at RM116,675,004. Costs to

A the plaintiff and costs to be taxed unless agreed.

POSTSCRIPT

[55] For clarification of court's ruling on 10 November 2008.

B

Mr James

[56] On the issue of costs, parties have agreed that the defendants to pay costs on both appeals. The other matter is the interest. The plaintiff is asking C the interest on the judgment sum either from the date of the breach or at the latest from the date of judgment given by Justice Lau Bee Lan in this case. The plaintiff relies on O 42 r 12.

Ms Yap

D

[57] On issue of costs we are not disputing. We rely on the notes of proceedings. As to interest, the award given by the learned deputy registrar which was appealed on there is no mention of interest. The issue of interests also not raised in the appeal. That is why it is not agreeable to be inserted in E the draft order.

COURT

[58] I agree with the plaintiff's counsel that the judgment shall carry F interest of 8%. The language in O 42 r 12 is mandatory, it uses the word 'shall carry'. However I will order that the interest to be awarded on the judgment sum to take effect only from the date of judgment on liability given in favour of the plaintiff in this case by Mdm Justice Lau Bee Lan on 1 July 2005.

G

[59] The court also acknowledged that on 10 November 2008 when the ruling on the appeal on assessment of damages was delivered, the defendants' counsel ie the senior state legal officer Mr Thomas Akin did tender points of clarification on the main submissions on the appeal as to damages. But the H court decided to deliver the ruling any way because the court is of the opinion that no further clarification was required.

Defendants' appeal dismissed with costs. Plaintiff's cross-appeal allowed with costs.

I

Reported by Kohila Nesan